UNITED NATIONS

AT

Administrative Tribunal

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ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 858

Case No. 946: Mr. M.

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Hubert Thierry, President; Mr. Mayer Gabay; Mr. Julio Barboza;

Whereas at the request of Mr. M., a former staff member of the United Nations, the President of the Tribunal, with the agreement of the Respondent, successively extended until 31 January, 30 April, 31 July and 30 September 1996, the time-limit for filing an application with the Tribunal;

Whereas, on 24 September 1996, the Applicant filed an application requesting the Tribunal, inter alia:

"... to find that:

3. The Applicant was misled when he was approached for agreed termination by ... [the] Executive Officer of the Department for Development Support and Management Services (DDSMS).

4. ... [the] Director of Personnel misunderstood the purpose of agreed termination since it is intended to compensate the departing staff member not only for loss of income, but also and above all for losses due to the UNJSPF actuarial losses or penalties.

5. Other staff members who opted for agreed termination, especially if they were not yet 60 as the Applicant, had new jobs waiting for them. Therefore denying the Applicant agreed termination because he may have had a job waiting for him is discriminatory.

And consequently

> To order the Respondent to pay him the amount that was initially proposed to him (and actually paid to the other staff members, namely 18 months' termination indemnity as indicated in ...) until the offer was withdrawn, plus interest."

Whereas the Respondent filed his answer on 10 July 1997;

Whereas, on 10 October 1997, the Applicant filed written observations;

Whereas, on 20 October 1997, the Applicant filed additional submissions with the Tribunal;

Whereas the facts in the case are as follows:

The Applicant entered the service of the Organization on 15 March 1968, as a Professional Trainee, on a two-year, fixed-term appointment, at the P-2, step I level, in the Office of Technical Cooperation, Economic and Social Affairs, Office of Personnel Services. On 15 March 1970, his functional title was changed to Associate Programme Management Officer. On 1 May 1970, he received a probationary appointment, which was converted to a permanent one on 1 February 1971, when he was promoted to the P-3 level and became a Programme Management Officer. The Applicant was promoted to the P-4 level on 1 April 1974. With effect from 1 October 1976, the Applicant's functional title was changed to Programme Coordinator. On 1 April 1978, the Applicant was promoted to the P-5 level and became Senior Programme Coordinator. With effect from 1 November 1981, the Applicant served as Chief, Policy Development and Coordination Section, Department for Technical Cooperation and Development (DTCD). On 1 January 1985, the Applicant was promoted to the D-1 level. On 10 February 1988, he became Deputy Director and Chief of Branch of DTCD. On 1 October 1992, he was seconded to the United Nations Development Programme for one year where he

served as Special Advisor to the Deputy Prime Minister and Foreign Minister of Malta. He subsequently returned to the Department for Development Support and Management Services (DDSMS). The Applicant separated from service on 30 June 1994.

On 18 September 1993, the Deputy Prime Minister and Minister of Foreign Affairs of Malta wrote to the Secretary-General, expressing the wish of the Government of Malta to appoint the Applicant as its Permanent Representative to the United Nations Office in Geneva. He requested that the United Nations advance by six months the Applicant's early retirement, for which he would otherwise be eligible upon reaching the age of 55 years on 21 May 1994. In that same letter, the Deputy Prime Minister of Malta also requested an early decision on the transfer of the Applicant's wife to Geneva in order "to assist [the Applicant] to settle his family in his new posting". In a reply dated 1 December 1993, the Under-Secretary-General for Administration and Management (USG/A&M) stated that the Pension Fund Rules did not allow the Organization to advance the Applicant's early retirement. She advised the Deputy Prime Minister of Malta that it would also not be possible for the Organization to place the Applicant on special leave for the five month period until he reached the age of fifty-five, since such leave was in contravention of the Staff Rules, which provided that "special leave shall not be authorized ... in a diplomatic or other representational post for the purpose of performing any functions that are incompatible with the staff member's continuing status as an international civil servant ...". The USG/A&M suggested that the best course of action would be for the Applicant to resign as of 31 December 1993, and avail himself of the deferred retirement benefit provided by the Pension Fund Regulations. With regard to the request for the transfer of the Applicant's wife to Geneva, the USG/A&M informed the Deputy Prime Minister of Malta that the Office of Human Resources Management (OHRM) was actively looking into the possibility of accommodating her there.

On 3 March 1994, the Applicant was approached by the Executive Officer, DDSMS, and asked whether he would be interested in being considered for an agreed termination. On 4 March 1994, the Applicant confirmed to the Executive Officer, DDSMS, that he would "like to be considered for agreed termination". On the same date, the Executive Officer, DDSMS, sent the Applicant's memorandum to OHRM, informing them that DDSMS had no objection to the Applicant's request for an agreed termination.

The Budget Division considered the feasibility and financial implications of agreed terminations for a number of DDSMS staff members. On 4 May 1994, the Director of the Budget Division advised the Executive Officer, DDSMS, that a total amount of $1.5 million could be used for agreed terminations, which would cover some 20 to 23 staff members, depending on the length of service which would determine the number of months of indemnity. He also explained that "the package to be offered within the [above] $1.5 million should be worked out with the Director of Personnel."

On 9 May 1994, the Director of Personnel decided that giving an agreed termination to the Applicant was not in the interest of the Organization. OHRM would make this recommendation to the Secretary-General. The decision of the Director of Personnel was conveyed to the Applicant on 10 May 1994.

On 12 May 1994, the Applicant wrote to the Executive Officer, DDSMS, submitting his resignation with effect from 1 July 1994. He explained that "[o]n the assumption that I would be given agreed termination, as I have been led to believe would be possible since 3 March 1994, I have made commitments which I am not in a position to break at this time". In a reply dated 8 June 1994, the Executive Officer, DDSMS, accepted his resignation.

On 6 June 1994, the Applicant wrote to the Secretary-General, requesting review of the administrative decision not to grant him an agreed termination. On 15 November 1994, the Applicant lodged an appeal with the Joint Appeals Board (JAB). The JAB adopted its

report on 22 June 1995. Its considerations, conclusions and recommendations read, in part, as follows:

"...

26. The Panel first examined the question of whether the Appellant had been offered an agreed termination. The Panel took note of the Appellant's contentions that he had been approached by DDSMS, following consultations with OHRM, to determine whether or not he would consider entering into an agreement for the termination of his permanent appointment. This he claimed, gave him the right to expect an agreed termination.

27. ... .

28. The Panel concluded that in the absence of an offer, there was no legally binding agreement between the Appellant and the Secretary-General. The Panel agreed with the Respondent that the required steps had to be followed in order for a staff member to benefit from an agreed termination. The Panel noted that such steps were never followed in this case, as the initial discussions never resulted in an offer and acceptance. Accordingly there was no agreement.

29. The Panel then considered the question of whether the decision not to recommend to the Secretary-General an agreed termination of the Appellant's appointment, which was based on the fact that the Appellant had been appointed by his Government as the Maltese Permanent Representative to the United Nations Office in Geneva, violated his rights.

30. In this context, the Panel noted the Appellant's contention that the Director of Personnel took her decision on the basis of wrong information and that her understanding of the Appellant's decision to postpone the acceptance of the post of Ambassador until June 1994, was wrong. As a result [of] the Director of Personnel's wrong 'understanding' the Appellant was prevented from being given an agreed termination.

31. The Panel considered the Appellant's above-mentioned contentions regarding the Director of Personnel's decision. In this regard, the Panel, bearing in mind that the Appellant had carried the burden of proof, felt that the facts as shown in the records and as explained by the Respondent would [have] passed the test of being convincing to 'a reasonable

person'. The Panel noted that the Government of Malta was interested in the Appellant's services. The records indicated that some pressure had been exerted at the time by the Appellant's wife and on her behalf for a transfer to Geneva to allow the family to stay together when the Appellant would take up his new functions. It also noted that the Appellant had been ready to accept the post on 1 January 1994, when the only issues raised by his Government related to the possibility of advancing the age at which he could receive an early retirement benefit, and the transfer to Geneva of his wife. The Panel noted that the Appellant had resigned to take up his Government duties only after reaching age 55, when he became eligible for early retirement benefit.

32. On the other hand, the Panel felt that the Appellant's version and explanations were not plausible. Furthermore, the Panel found that the Appellant offered no evidence of prejudice, or other improper motives which could in some way vitiate the Director of Personnel's decision not to recommend an agreed termination in his case.

33. The Panel was not able to find any wrongdoing on the part of the Director of Personnel, nor any evidence of improper exercise of her discretionary authority by not recommending to the Secretary-General an agreed termination of the Appellant's appointment. The Panel noted that, the Director of Personnel felt that there was no need to encourage the Appellant to leave the Organization[, s]ince it was clear to her that the Appellant would separate in any event. Her decision not to recommend his agreed termination was therefore properly taken.

34. The Panel finally considered the question of whether the Appellant had been discriminated against in view of the fact that some of his colleagues had been granted agreed terminations.

35. The Panel considered that agreed termination was an individual arrangement between a particular staff member and the Secretary-General which resulted from the Organization's need to reduce or replace staff on one hand, and the readiness of the staff concerned to leave in return for better separation conditions. The Panel concluded therefore, that even where staff members were offered an agreed termination 'package', the terms and conditions of the agreement, as well as the financial arrangement could vary from case to case.

36. In the light of the above, the [P]anel concluded that the Appellant had not been discriminated against by comparison with his colleagues who had been granted agreed termination.

Conclusions and recommendations

37. The Panel concluded that the decision not to proceed with an agreement for the termination of the Appellant's permanent appointment did not violate his rights, including his right to due process.

38. Accordingly, the Panel makes no recommendation in support of the appeal."

On 14 July 1995, the USG/A&M transmitted a copy of the JAB report to the Applicant and informed him, as follows:

"The Secretary-General has examined your case in the light of the Board's report. He has noted the Board's conclusions that in the absence of an offer, there was no legally binding agreement between you and the Secretary-General; that you offered no evidence of prejudice or other improper motives which could vitiate the Director of Personnel's decision not to recommend an agreed termination in your case; that you had not been discriminated against by comparison with your colleagues who had been granted agreed termination; that the decision not to proceed with an agreement for the termination of your permanent appointment did not violate your rights, including your right to due process. The Board consequently made no recommendation in support of your appeal. The Secretary-General has accordingly decided to reject your appeal."

On 24 September 1996, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The Organization initiated talks with the Applicant regarding an agreed termination. Its subsequent decision not to offer the Applicant an agreed termination after he had committed to leave the Organization violated the principle of good faith, was unjustified and arbitrary.

2. The decision to deny the Applicant an agreed termination because he had a position waiting for him outside the Organization was discriminatory since other staff members in a similar situation received agreed terminations.

Whereas the Respondent's principal contentions are:

1. The Administration's initial inquiry to the Applicant on whether he would be interested in agreed termination did not create a right for the Applicant to an agreed termination.

2. The Secretary-General's decision not to offer an agreed termination was consistent with applicable provisions of the Staff Regulations and Rules, did not violate Applicant's rights and was not motivated by prejudice or other extraneous factors.

The Tribunal, having deliberated from 6 to 25 November 1997, now pronounces the following judgement:

I. The Tribunal first considered whether there was a valid offer of an agreed termination and, if so, the nature of the offer. The Tribunal notes that, on 3 March 1994, the Applicant was approached by the Executive Officer, DDSMS, to ascertain whether he would accept being considered for an agreed termination by the Secretary-General. In view of the fact that such offers were usually made by the Executive Officer, DDSMS, and taking into consideration its judgement in Tortel (No. 444: 1989), the Tribunal concluded that there was a valid offer.

II. However, the Tribunal notes that the offer made was that the Applicant would be <u>considered</u> for an agreed termination; hence, his acceptance was not sufficient to conclude a binding contract between

him and the Organization that he would be given an agreed termination. There were several other steps to be taken before such an agreement could finally be reached. Indeed, the Applicant himself seems to have assessed the situation in a similar manner, stating in his memorandum of 4 March 1994, to the Executive Officer, DDSMS, that "[he] would like to be considered for an agreed termination." Thus, a final decision on the Applicant's agreed termination was still pending with the Secretary-General, under staff rule 9.1.

III. The Tribunal recalls that, on 6 May 1994, the Applicant's name had been published in a list of staff members who were to be offered an agreed termination and funds had apparently already been assigned for that purpose. As a consequence, the Tribunal believes that, at that moment, the Applicant had justified expectations of obtaining an agreed termination.

IV. The reason behind the final decision not to grant the Applicant an agreed termination seems to have been the existence of an offer to the Applicant to fill the post of Permanent Representative of Malta to the United Nations organizations in Geneva. This offer was made in a letter from the Maltese Government, dated 8 September 1993, and was known to the Director of Personnel. Given these facts, the Tribunal fails to understand why the Respondent solicited the Applicant's views on a possible agreed termination in early March 1994, since the Administration could have waited until events took a definitive turn before advancing this idea.

V. The Tribunal finds that there was no meeting of the minds between the Applicant and the Respondent regarding the complete

process of an agreed termination. However, there was certainly an offer made by the Respondent to consider granting the Applicant an agreed termination, and an acceptance by the Applicant of this as a possible outcome. Given the foregoing, the Tribunal considers that both parties agreed to continue considering this course of action in good faith. However, the Respondent's abrupt termination of the Applicant's service, his silence as to the reasons for interrupting the process leading to an agreed termination, and the fact that he knew all along of the Applicant's outstanding offer to work outside the Organization, lead the Tribunal to the conclusion that the Respondent did not honour his agreement to proceed in good faith with respect to achieving an agreed termination.

VI. The Tribunal finds that, for breaching his agreement with the Applicant to proceed in good faith, the Respondent must pay to the Applicant compensation in the amount of six (6) months of the Applicant's net base salary, at the rate in effect at the time of his termination.

VII. On the other hand, the Tribunal finds no evidence to substantiate the Applicant's claim of discrimination and rejects his contention in this regard.

VIII. For the foregoing reasons, the Tribunal orders the Respondent to pay to the Applicant the amount of six months of the Applicant's net base salary at the rate in effect on the date of his separation from service.

IX. The Tribunal rejects all other pleas.

(Signatures)

Hubert THIERRY
President

Mayer GABAY
Member

Julio BARBOZA
Member

New York, 25 November 1997

R. Maria VICIEN-MILBURN
Executive Secretary